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05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 CHERYL DIANNE BOUCHER,)
08 Plaintiff,) CASE NO. C13-47-MAT
09 v.)
10 CAROLYN W. COLVIN, Acting) ORDER RE: SOCIAL SECURITY
Commissioner of Social Security,¹) DISABILITY APPEAL
11 Defendant.)
12 _____)

13 Plaintiff Cheryl Dianne Boucher proceeds through counsel in her appeal of a final
14 decision of the Commissioner of the Social Security Administration (Commissioner). The
15 Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after two
16 hearings before an Administrative Law Judge (ALJ). Having considered the ALJ's decision,
17 the administrative record (AR), and all memoranda of record, this matter is AFFIRMED.

18 **FACTS AND PROCEDURAL HISTORY**

19 Plaintiff was born on XXXX, 1957.² She completed high school, and worked as an
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21 ¹ On February 14, 2013, Carolyn W. Colvin became the Acting Commissioner of the Social
Security Administration. Therefore, under Federal Rule of Civil Procedure 25(d)(1), Carolyn W.
Colvin is substituted for Commissioner Michael J. Astrue as the Defendant in this suit.

22 ² Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule
of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic

01 educational assistant until 1999. (AR 133-37.)

02 Plaintiff applied for DIB on May 31, 2006. (AR 96-98.) That application was denied
03 initially and upon reconsideration, and Plaintiff timely requested a hearing. (AR at 66-68, 70-
04 72.)

05 On March 6, 2009, ALJ Verrell Dethloff held a hearing, taking testimony from
06 Plaintiff and Plaintiff's husband. (AR 33-63.) On April 1, 2009, the ALJ issued a decision
07 finding Plaintiff not disabled. (AR 23-32.) Plaintiff timely appealed, and U.S. District Court
08 remanded the case with instructions to consider the post-hearing evidence related to Plaintiff's
09 multiple chemical sensitivity. (AR 445-59.) The ALJ issued a new decision on March 11,
10 2011, again finding Plaintiff not disabled. (AR 364-77.) Plaintiff appealed the
11 Commissioner's second decision to this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §
14 405(g).

15 **DISCUSSION**

16 The Commissioner follows a five-step sequential evaluation process for determining
17 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
18 must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had
19 not engaged in substantial gainful activity since June 1, 1999, the alleged onset date. (AR
20 367.) At step two, it must be determined whether a claimant suffers from a severe

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22 Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 impairment. The ALJ found that Plaintiff did not have a medically determinable impairment
02 before her date last insured (DLI). (AR 367-76.) The ALJ found that Plaintiff was not
03 disabled at step two, and thus did not continue through the rest of the sequential process. (AR
04 376-77.)

05 This Court's review of the ALJ's decision is limited to whether the decision is in
06 accordance with the law and the findings supported by substantial evidence in the record as a
07 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
08 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
09 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
10 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
11 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
12 F.3d 947, 954 (9th Cir. 2002).

13 Plaintiff argues the ALJ erred by failing to comply with the District Court's remand
14 order in two ways: (1) by rejecting the records of David Buscher, M.D., that the Court
15 instructed the ALJ to consider, and (2) failing to consider evidence provided by "other"
16 sources and by Plaintiff and her husband in light of Dr. Buscher's evidence. The
17 Commissioner argues that the ALJ's decision should be affirmed because it complies with the
18 remand order and is supported by substantial evidence.

19 Dr. Buscher's Evidence

20 The Report and Recommendation (R&R) previously adopted by the U.S. District
21 Court indicated that Dr. Buscher was an "acceptable medical source," and that his records
22 contained objective evidence substantiating Plaintiff's multiple chemical sensitivity (MCS)

01 diagnosis, but did not determine whether Dr. Buscher's post-DLI evidence (which had been
02 submitted post-hearing) established that Plaintiff's MCS constituted a medically determinable
03 impairment during the relevant period. (AR 455-57.) The R&R thus instructed the ALJ on
04 remand to reconsider his step-two findings in light of Dr. Buscher's newly submitted
05 evidence, and if he found that it established that Plaintiff's MCS was a medically
06 determinable impairment during the relevant period, then evidence submitted by "other"
07 sources and Plaintiff and her husband could be considered when assessing the severity of
08 Plaintiff's impairments. (AR 454, 457-59.)

09 On remand, the ALJ did discuss Dr. Buscher's evidence and concluded that it did not
10 establish that Plaintiff's MCS was medically determinable during the relevant period, because
11 Dr. Buscher did not first evaluate Plaintiff until June 2009 — ten years after her alleged onset
12 date, and more than four years after her DLI — and none of the objective medical evidence he
13 cites bears any connection to the relevant time period, and he did not suggest that his tests
14 were retrospective. (AR 372-75.) Because the ALJ found that Dr. Buscher's evidence did not
15 establish the existence of a medically determinable impairment during the relevant time
16 period, he stated that he need not reconsider the evidence provided by Plaintiff, her husband,
17 and/or her "other" treating sources. (AR 375-76.)

18 Plaintiff contends that the ALJ erred in rejecting Dr. Buscher's evidence for lack of
19 probative diagnostic techniques, citing the 2009 allergy tests he performed that "lend support
20 to the diagnosis of [MCS]." (AR 557.) Dkt. 12 at 2-3. But, as the ALJ indicated, the 2009
21 allergy tests are in no way connected to the relevant time period; Dr. Buscher noted that her
22 symptoms increased in 1999, but admitted that the date of MCS onset "isn't clear". (AR 557.)

01 The R&R did not instruct the ALJ to find that Dr. Buscher's evidence established the
02 existence of MCS during the relevant time period; it only instructed the ALJ to consider Dr.
03 Buscher's evidence to determine *whether* Plaintiff's MCS existed during the relevant time
04 period, which is precisely what the ALJ did. (AR 457 ("On remand, the ALJ should consider
05 the evidence from Dr. Buscher, along with any updated medical evidence Boucher may
06 submit, in reconsidering whether the record establishes the existence of MCS as a medically
07 determinable impairment prior to Boucher's date last insured.").)

08 Plaintiff has offered no plausible theory as to how Dr. Buscher's evidence is probative
09 as to the relevant time period, other than to allege that the gaps in time noted by Dr. Buscher
10 can be filled with evidence provided by non-acceptable medical sources (Dkt. 10 at 8) — but
11 this argument was rejected in the R&R, which correctly noted that non-acceptable medical
12 source evidence cannot establish the existence of a medically determinable impairment. (AR
13 454 ("The ALJ did not err in finding that [non-acceptable medical sources'] records could not
14 support a finding that Boucher had a medically determinable impairment.").) *See also*
15 *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005) (holding that a claimant "can only
16 establish an impairment if the record includes signs — the results of 'medically acceptable
17 clinical diagnostic techniques,' such as tests — as well as symptoms[.]"). Particularly in light
18 of Plaintiff's testimony that she became more sensitive to chemicals *after* her DLI (AR 39-
19 40), it was reasonable for the ALJ to find that the 2009 allergy tests were not probative for
20 purposes of the 1999-2004 period. *See Smith v. Bowen*, 849 F.2d 1222, 1225-26 (9th Cir.
21 1988) (holding that post-DLI evidence can be relevant to evaluation of the pre-DLI
22 condition).

01 While the remote timing of Dr. Buscher's evidence would not alone suffice as a reason
02 to discount its probative value, the fact that Dr. Buscher's evidence provides no suggestion of
03 retrospective application — and, in fact, suggests the opposite, by noting that Plaintiff's onset
04 date is unclear — supports the ALJ's finding that Plaintiff failed to establish the existence of
05 MCS as a medically determinable impairment during the relevant period. *See, e.g., Capobres*
06 *v. Astrue*, 2011 WL 1114256, at *5 (D. Ida. Mar. 25, 2011) (explaining that while post-DLI
07 medical evidence cannot be rejected solely as remote in time, it can be rejected on the grounds
08 that the evidence itself is not retrospective). In the absence of finding the existence of a
09 medically determinable impairment, the ALJ correctly interpreted the remand order to mean
10 that reconsideration of "other" source evidence and lay evidence was not required. (AR 459
11 ("[I]f the ALJ finds that there is sufficient medical evidence to establish the existence of MCS
12 as a medically determinable impairment prior to her [DLI], the ALJ should reevaluate
13 Boucher's symptom testimony and her husband's description of how her symptoms affect her
14 daily activities and ability to work in assessing the severity of the impairment.").)
15 Accordingly, Plaintiff has failed to establish that the ALJ's second decision erroneously
16 interpreted the remand order or erred in any other respect.

17 CONCLUSION

18 For the reasons set forth above, this matter is AFFIRMED.

19 DATED this 18th day of July, 2013.

20 /S/ MARY ALICE THEILER

21 Mary Alice Theiler

22 United States Magistrate Judge